

Barry N. Gutterman, Esq. (BG6410)
Robert Briere Esq. (RB6080)
Barry N. Gutterman & Associates, P.C.
Attorneys for Defendant
Union Pacific Railroad Company
60 East 42nd Street, 46th Floor
New York, New York 10165
(212) 983-1466

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MITSUI SUMITOMO INSURANCE CO., LTD.

Plaintiffs

v.

EVERGREEN MARINE CORPORATION and UNION
PACIFIC RAILROAD COMPANY

Defendants.

ECF Case

**07 CV 3874
(Judge McMahon)**

**UNION PACIFIC RAILROAD COMPANY'S
ANSWER AND AFFIRMATIVE DEFENSES
TO EVERGREEN MARINE CORPORATION'S CROSS-CLAIMS**

Defendant Union Pacific Railroad Company ("UP"), by its attorneys, Barry N. Gutterman & Associates, P.C., for its Answer and Affirmative Defenses to Evergreen Marine Corporation's ("Evergreen") Cross-Claims, states as follows:

- 1-41. UP does not respond to paragraphs 1-41 as such allegations are not addressed to it.
42. UP repeats and reallages its response to paragraphs 1-41 as its response to paragraph 42.
43. UP denies the allegations contained in paragraph 43 of the Cross-Claims.

44. UP repeats and reallages its response to paragraphs 1-43 as its response to paragraph 44.

45. UP denies the allegations contained in paragraph 45 of the Cross-Claims.

**AS AND FOR A FIRST
AFFIRMATIVE DEFENSE**

46. To the extent that the plaintiff and Evergreen failed to meet the minimum filing requirements of filing a proper written claim within the time prescribed, this lawsuit is time barred.

**AS AND FOR A SECOND
AFFIRMATIVE DEFENSE**

47. To the extent that Evergreen failed to file cross-claims within the period proscribed, their cross-claims are time barred.

**AS AND FOR A THIRD
AFFIRMATIVE DEFENSE**

48. The complaint and cross-claims fail to state a claim against UP on which relief may be granted.

**AS AND FOR A FOURTH
AFFIRMATIVE DEFENSE**

49. In the event that the plaintiff and/or Evergreen had not or has no title or interest in the shipment that is the subject of this action, then the plaintiff and/or Evergreen is not the real party in interest an is not entitled to maintain this suit.

**AS AND FOR A FIFTH
AFFIRMATIVE DEFENSE**

50. In the event that said shipment moved subject to any statutory or contractual limitations of liability, either specifically agreed to or contained in any applicable

tariffs and/or governing publications, the plaintiff and/or Evergreen may not recover in excess of such limitations.

**AS AND FOR A SIXTH
AFFIRMATIVE DEFENSE**

51. Plaintiff's common law claims are preempted by federal law.

**AS AND FOR A SEVENTH
AFFIRMATIVE DEFENSE**

52. The bill of lading, tariffs and classifications and the governing publications do not contemplate responsibility for special damages. To the extent, that plaintiff and/or Evergreen seeks recovery for special damages, UP is not responsible.

WHEREFORE, defendant Union Pacific Railroad Company demands judgment; (1) dismissing the Cross-Claims with prejudice, together with the costs, disbursements and reasonable attorneys fees; and (2) for such other or different relief as this Court may deem just and proper.

Dated: New York, New York
June 21, 2007

By: /s/ Barry N. Gutterman
Barry N. Gutterman, Esq. (BG6410)
Robert Briere, Esq. (RB6080)
Barry N. Gutterman & Associates, P.C.
60 East 42nd Street, 46th Floor
New York, New York 10165
Phone: (212) 983-1466

Attorneys for Defendant
Union Pacific Railroad Company

To: David L. Mazaroli, Esq. (DM-2929)

11 Park Place – Suite 1214
New York, New York 10007-2801
Phone: (212) 267-8480

Attorneys for Plaintiff

Jessica DeVivo, Esq. (JAD-6588)
Chichanowicz, Callan, Keane, Vengrow & Textor
61 Broadway, Suite 3000
New York, New York 10016
Phone: (212) 344-7042

Attorneys for Defendant Evergreen Marine Corporation

UP2718.aad.Evergreen.Cross Claims